

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1002

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 77-1002

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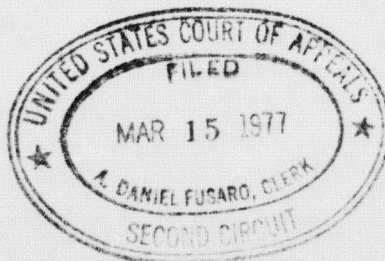
ANGEL CASTILLON, Appellant

v.

THE UNITED STATES OF AMERICA, Respondent

APPEAL OF CONVICTION

* APPENDIX
BRIEF FOR ANGEL CASTILLON



Richard Kranis,
ATTORNEY FOR APPELLANT

PAGINATION AS IN ORIGINAL COPY

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the District Court judge improperly prejudiced the jury against the defendant Castillon by aiding in his identification by the government's first witnesses and by cutting off cross-examination on this point.

STATEMENT OF THE CASE

This case is before the court upon appeal from a judgment of the District Court (M. Mishler, J.) entered on December 17, 1976, after conviction by a jury, sentencing the defendant Castillon to the custody of the Attorney General for a period of five years and a special parole term of five years.

The case was begun on September 23, 1975, by the filing of indictment number 75 CR 698 charging six named defendants with conspiracy to violate section 841(a)(1) of Title 21, United States Code. At the trial, only four of the named defendants were present, including the defendant Castillon.

Following the jury selection and following the opening statements to the jury, the Government's first witnesses was Jesus Torrado. Mr. Torrado, named in the indictment as an undicted co-conspirator, was the Government's main witness, having made a "deal" to testify. His testimony had only just begun when Mr. Torrado made the first reference of the trial to the defendant Castillon. Whereupon, the identification complained of here occurred. (5)

Subsequently, after the direct examination of Mr. Torrado was completed, the first area inquired into on cross-examination was this very identification. This area of examination was proscribed by the judge. (8)

All references are to the Appendix.

At the conclusion of all the evidence, the judge charged the jury and the jury retired for deliberation. The jury then returned and delivered a verdict of guilty as to the defendant Castillon. After further deliberation, the jury could not agree to a verdict as to the other three defendants and a mistrial was declared.

Subsequently, the defendant Castillon was sentenced as heretofore stated and this appeal followed.

ARGUMENT

- I. THE DISTRICT COURT JUDGE IMPROPERLY PREJUDICED THE JURY BY AIDING IN THE IDENTIFICATION OF THE ACCUSED AND REFUSING TO ALLOW CROSS-EXAMINATION ON THIS POINT.

It is well settled and axiomatic that actions by a judge which are prejudicial to a defendant are inimicable to a fair trial and that a conviction obtained after such a trial should be overturned (See, E.G., United States v. Persico, 305 F. 2d 534 (2d. Cir. 1962)).

In this case, the judge's actions in virtually identifying the defendant Castillon for the witness had the effect of singling out this particular defendant before the jury and, however unintentionally, indicating to the jury the judge's belief in this particular defendant's guilt. The prejudice was made all the worse by the fact that this identification was made at the very outset of the trial, at the first mention of Mr. Castillon's name, and thus could have very easily had the effect of rendering the jury more receptive to evidence concerning this particular defendant, if not of convincing the jury of his guilt right then and there. The prejudice was compounded by the judge's action when this matter was inquired into on cross-examination. (Appendix, page 8). At that time, Mr. Castillon's attorney was attempting to demonstrate to the jury that the witness had not actually identified Mr. Castillon. This line of questioning was not allowed by the judge.

Moreover, the judge, at this time, made the following gratuitous remark at page 8:

"THE COURT: Objection sustained. The jury will recall the identification, and for the record let me say that the witness properly identified the defendant Cabada."

Admittedly, this remark concerned the witness' identification of the defendant Cabada. However, this line of examination was intended to show that the witness had initially pointed out the defendant Cabada when asked to identify the defendant Castillon, and that the actual identification of the defendant Castillon was in reality made by the judge. In addition, the judge's comments as to the validity of the identification, made to Mr. Castillon's attorney, in front of the jury, had the effect of indicating to the jury that no question as to identification was present in the trial. This exchange had the further effect of reinforcing in the minds of the jury, the judge's belief as to the guilt of Mr. Castillon made manifest earlier when he had in fact identified Mr. Castillon for the jury.

There are many cases in which a defendant has been compelled to stand and be identified by a witness. Numerous challenges to this procedure on the ground of self-incrimination have been rightly rejected. However, review of this line of cases will indicate that none contained the element of prejudice which is manifest here.

For example, in Cowans v. Warden, Maryland Penitentiary, 276 F. Supp. 696 (D.C. Md. 1967), the defendant was compelled to stand after being identified by the witness as "the small

one sitting over there". In the present case, there was no clear identification of Mr. Castillon by the witness before Mr. Castillon was required to stand by the judge. Here, the jury could easily draw the inference that the defendant was being required to stand, not merely to facilitate his viewing by the jury, but as a manifestation of the judge's belief in the validity of the witness' identification and, indeed, as a manifestation of the judge's belief in Mr. Castillon's ultimate guilt.

In Mikus v. United States, 433 F. 2d 719 (2d Cir. 1970), and United States v. Zammiello, 432 F. 2d 72 (9th Cir. 1970), the defendant was compelled to stand by the United States' Attorney to facilitate his identification by the witness. These cases are, of course, inapposite to the present case in that the defendant was requested to stand by the United States Attorney as opposed to the judge. Juries can be expected to understand that the prosecuting attorney is in an adversary position in relation to the accused, and therefore would give no more weight to this method of identification than is justified in their minds by the very fact of identification itself. However, an order to stand by a judge, made even before a proper identification was made by a witness, presents a different problem. Here, the defendant is being pointed out by a courtroom actor who is not in an adversary position to the accused, who is held by the jury in awe as the fount of impartiality, wisdom and justice. The prejudice inherent in such a procedure is incalculable.

This line of cases concerns the question of whether requiring the defendant to stand and be identified violates his

right against self-incrimination. Even in these cases, where the law is clear, the courts have held as in United States v. Denno, 355 F. 2d 731, 735 (2d Cir. 1966):

" As a matter of law, the method of identification inside or outside the courtroom would go to the weight to be attributed to the identification; not to the admissibility or constitutionality of testimony relating thereto..."

Thus, even in those cases where the jury could not possibly be prejudiced by the method of identification, the courts have indicated that the manner of identification should be weighed by the jury. This, of course, necessitates cross-examination on this issue. Not only did the judge's refusal to allow cross-examination on this point deprive the defendant Castillon of his right to convince the jury that a proper identification was not made, which is clearly error, but it enhanced in the jury's mind the judge's belief as to the defendant Castillon's guilt.

It is certainly clear that much evidence was introduced at the trial tending to prove the guilt of the defendant Castillon, but the fact remains that it is quite possible that the jury was improperly influenced at the very outset of the trial by the judge's behavior at the first mention of Mr. Castillon's name. This supposition is supported by the very fact that the defendant Castillon was the only one of the four defendants to be convicted by this jury. The fact that he was singled out by the judge, early in the trial, may have had a great deal to do with this result.

The prohibition of cross-examination on this point, error in itself, had the added effect of enhancing this prejudice, consciously or subconsciously, in the minds of the jury.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be reversed and this case remanded to that Court for a new trial.

Respectfully submitted,

RICHARD KRANIS, ESQ.
Attorney for Defendant-Appellant
25 Broad Street
New York, New York 10004

APPENDIX

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U.S. DISTRICT COURT - CRIMINAL DOCKET

JUDGE/MAGISTRATE Assigned Trial
 207 1 0713
 District Office Disp./Sentence

U.S. 5CR 698-1

ANGEL CASTILLON defendant

Day Mo. Yr. 23 9 75
 No. of 6
 Defdnts

U.S. CODE SECTION 21:846

OFFENSES Did conspire to possess cocaine

COUNTS 1

U.S. Attorney or Asst. Charles Clayman

Defense: CJA, Ret, Waived, L Self, L None

Richard Kranis
 25 Broad St. NYC.
 422-5950

BAIL • RELEASE
☐ Personal Recognizance
☐ Unsecured Bond
☐ Conditional Release
 AMT Set (000) \$
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ Bail Not Made
☐ Bail Status Changed (See Docket)
☐ 3rd Party Custody
☐ PSA

ARREST INDICTMENT ARRAIGNMENT TRIAL SENTENCE

U.S. Custody or Began on Above Charges

High Risk Defn. & Date Design'd

Information 9/23/75

Waived

Superseding Indict/Info

Prosecution Deferred

Trial Set For

Voir Dire

Disposition

1st Plea

Final Plea

Not Guilty

Nolo

Guilty

Not Guilty

Nolo

Guilty

Convicted

Acquitted

Dismissed

Not Guilty/Discontinued

On All Charges

On Lesser Offense(s)

WOP

W

Search Warrant	Issued	DATE	INITIAL/No.	INITIAL APPEARANCE	INITIAL/No.	OUTCOME
Summons	Issued			PRELIMINARY EXAMINATION OR REMOVAL HEARING	Date Scheduled	Dismissed
	Served					
Arrest Warrant				Waived	Date Held	Held for District GJ
COMPLAINT				Not Waived	Intervening Indictment	Held to Answer to U. S. District Court
OFFENSE (In Complaint)				Tape No.	INITIAL/No.	AT: Magistrate's Initials

Show last names and suffix numbers of other defendants on same indictment/information

CABADA-2, HURTADO-3, ALVAREZ-4, DOE a/k/a Guzman-5, DOE, a/k/a Conti-6

DATE PROCEEDINGS

9/23/75 Before DOOLING, J. - Indictment filed and ordered sealed by the court- bench warrant ordered

9/24/75 Bench warrant issued

2/5/76 Before MISHLER, CH. J. - case called- On motion of Assistant U.S.A. Clayman indictment ordered unsealed

2/13/76 Before MISHLER, CH. J. - Case called- Deft Castillon and counsel present-Interpreter Margarita Mensa present-Deft arraigned and enters a plea of not guilty-Bail conditions are the same as in 76 CR 33- No date set for trial

3/1/76 Magistrates Proceedings received from S.D. Fla and filed acknowledgment mailed for receipt of file

3-22-76 Before MISHLER, CH J - case called - June 28, 1976 for trial on consent of all depts.

3-22-76 All counsel notified case is set for trial on June 28, 1976 and Certificate of Engagement filed.

3/24/76 Magistrates proceedings received from District of Fla and filed

3-29-76 Notice of Readiness for Trial filed

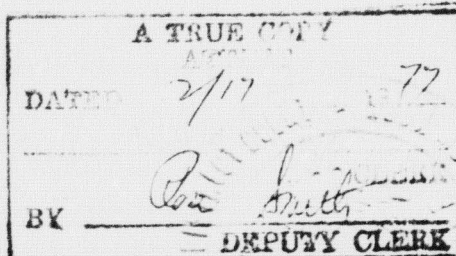
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V. Excludable Delay

(a)	(b)	(c)

DATE	V. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
4-26-76	76 M 610 inserted in CR file				
6-2-76	Notice of appearance filed.				
6-18-76	Before MISHLER, J.- Case called for defts motion to dismiss Motion argued and granted in part, denied in part and consented to in part as indicated on the record				
6-21-76	By MISHLER, J.- Voucher for expert services dtd. 6-18-76(HARARY)				
6-28-76	Before MISHLER, CH J - case called - adjourned to July 2, 1976 to reset a date for trial				
7-2-76	Notice of appearance filed.				
7-2-76	Before MISHLER, CH. J - Case called. 10-5-76 for trial.				
8-11-76	Amended motion to suppress filed (forwarded to Chambers)				
9-14-76	Govts Memorandum of Law in opposition to deft Hurtado's motion to suppress (see entry on deft Hurtado)				
10-5-76	Before MISHLER, J.-Case called-Deft and counsel present-Interpreter sworn-Hearing held on motion to suppress-Motion denied-Jury selected and sworn-Trial cont'd to 10-6-76 at 10 AM.				
10/6/76	Before MISHLER, CH. J.- Case called.Deft & Counsel present. Trial resumed. Trial continued to 10/7/76 at 10:00 a.m.				
10/7/76	Before MISHLER, CH. J. - Case called. Deft & Counsel present. trial resumed. Trial continued to 10/8/76 at 9:30 a.m.				
10-8-76	Before MISHLER, CH J - case called - deft present with atty - trial resumed - Interpreters Barron Boyne and Mr. Ras present - trial contd to Oct. 11, 1976				
10-11-76	Before MISHLER, CH J - case called - trial resumed - Govt rests - motion for judgment of acquittal denied - deft rests - trial contd to Oct. 12, 1976.				
10-12-76	Before MISHLER, CH J - case called - trial resumed - motion for judgment of acquittal is denied - trial contd to Oct. 13, 1976				
10-6-76	By MISHLER, CH J - Voucher for interpreting during trial filed (Manuel Ras)				
10-13-76	Before MISHLER, CH J - case called - deft present with atty- trial resumed - at 6:10 PM the Jury returned and rendered a verdict of guilty as to deft Castillon - jury polled - Jury suspended for the day and will resume their deliberations on Oct. 14, 1976 as to other defts. Motion to increase the defts bail argued - Bail increased to \$25,000 surety Co. bond - deft remanded until the bail is posted - trial contd to Oct. 14, 1976				
	Order of sustenance filed (lunch -15 persons)				
10/14/76	Voucher for compensation for expert services filed.(INTERPERTER).				
10-18-76	Voucher for Expert Services filed. (Michael Picozzi.)				
10-18-76	Stenographer's Transcript dated October 14, 1976 filed.				
10-19-76	Stenographers Transcript dated 10-6-76, 10-7-76, 10-8-76				
	10-12-76 and 10-11-76. H - Filed.				
11-22-76	Stenographers transcript filed dated Oct. 13, 1976				
12/17/76	By MISHLER, CH. J - Order appointing interpreter for expert services filed.				
12/17/76	Voucher for compensation for expert services filed.				

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
12-17-76	Before Mishler, J.- Case Called. Deft. & Counsel present. Deft. sentenced to a term of imprisonment for a period of five (5) years and a special parole term of five (5) years. Court advised deft. of his right to appeal. Clerk to file notice of appeal without fee. Bail condition continued. Sentence stayed pending appeal.				
12-17-76	Judgment and Commitment filed. Certified Copies to Marshal and Probation.				
12-17-76	Notice of Appeal filed.				
12-17-76	Docket entries and copy of notice of Appeal mailed to the Court of Appeals.				
1/7/77	Scheduling order received from the C of A ordering that the record on appeal be filed on or before 1/12/77.				
2/9/77	Stipulation filed that only that portion of the record pertaining to this deft shall be sent over to the C of A.				
2-17-77	Record on appeal certified and mailed to the C of A				



BJF:CEC:sm
F. #

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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT ED NY

SEP 23 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TIME A.M.
P.M.

----- X
UNITED STATES OF AMERICA

- against -

Cr. No. _____
(T. 21, U.S.C., §841(a)(1)
and §846)

(Felix) > ANGEL CASTILLON,
> SANTIAGO CABADA,
> CARLOS HURTADO, also known as
"The Indian",
> LUCY ALVAREZ,
> JOHN DOE, also known as
"Jose Guzman",
(John Doe) > JOHN DOE, also known as
"Conti",

Defendants.

75 CR 698

----- X
THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 1st day of April 1975 and the 8th day of August 1975, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants ANGEL CASTILLON, SANTIAGO CABADA, CARLOS HURTADO, also known as "The Indian", LUCY ALVAREZ, JOHN DOE, also known as "Jose Guzman", JOHN DOE, also known as "Conti", together with Jesus Alvarez, Pedro Cruz, also known as "Jesus Torrado", Petro Abilla, and Rosa Rodriguez named herein as co-conspirators but not as defendants did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.

(1) It was a part of said conspiracy that the defendants would knowingly and intentionally possess with intent to distribute large quantities of cocaine, a Schedule II narcotic drug controlled substance.

(2) It was further a part of said conspiracy that the defendants and others would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846).

A TRUE BILL.

Richard B. Greener
FOREMAN

Samuel L. Trager
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

Q How had this meeting been arranged?

A Through the phone.

Q What if anything occurred when you met Mr. Cabada at that restaurant?

A We lunched and then he said his friend was waiting to meet me.

Q Did you and Mr. Cabada go somewhere and talk?

A Yes.

Q Where did you go?

A To a house located in Hialeah near Avenue Leon Road.

Q How did you get to this house?

A In my car.

Q What if anything occurred when you got to this house in Hialeah?

A There were two other people in the house.

Q Do you see either of the two people that were in that house in Court today?

THE COURT: Would you like to stand up and look around.

THE WITNESS: Yes.

Q Who is it that you see, sir?

A The man who is seated up front in green who is the short crewcut.

2 1
2 THE COURT: Will you stand up, Mr. Castillon?

3 Is that the man you identified?

4 THE WITNESS: Yes.

5 THE COURT: Let the record show the witness
6 identified the defendant Angel Castillon.

7 Q What if anything occurred when you and Mr.
8 Cabada came into the house where Mr. Castillon and the other
9 person was?

10 A Mr. Castillon got very angry with Mr. Cabada
11 for having brought me there, because he told me on prior
12 occasions, he didn't want to meet anyone.

13 THE COURT: Did he say that on prior occasions
14 that he told?

15 THE WITNESS: Yes. That is what he did, that he
16 didn't want to -- that he didn't want to meet anyone,
17 that is what he said he said I told you that, no.

18 Q Please tell us if you can remember what was
19 said or substantially what was said.

20 A Well, we arrived there and Santiago told
21 Castillon, look, this is the friend I had mentioned about. And
22 Castillon said how can you bring him to the house I told you
23 not to bring anybody to the house. And then Cabada went on
24 to say don't worry, don't worry, I know the man for many years.
25 So, then Cabada says do you trust me and Castillon said yes,

1
2 MR. CRANIS: I think it would have to be
3 myself, your Honor.

4 THE COURT: Start, but I know the time.
5 There is one thing I can do, is read time.

6 MR. CRANIS: It is all right, Judge.

7 THE COURT: Now, proceed. We are not clock-
8 watchers here.

9 MR. CRANIS: I will not ask Mr. Torrado if
10 he reads --

11 THE COURT: Just ask the question, Mr. Cranis.
12 Don't tell me what you won't ask, please.

13 CROSS-EXAMINATION

14 BY MR. CRANIS:

15 Q Mr. Torrado, do you recall earlier this
16 morning under direct examination from the Government, Mr.
17 Clayman, asking you to identify Mr. Cabada? Do you recall
18 that this morning, sir?

19 A Yes.

20 Q And do you recall, Mr. Torrado, your identi-
21 fying Mr. Cabada as the gentleman who is on my right with
22 the green suit with the flat top?

23 MR. CLAYMAN: Objection, your Honor, that
24 was not the testimony.

25 THE COURT: Objection sustained. The jury

1
2 will recall the identification, and for the record
3 let me say that the witness properly identified the
4 defendant Cabada.

5 MR. CRANIS: I don't wish to argue the
6 question but that took place afterwards.

7 THE COURT: Next question, Mr. Cranis.

8 MR. CRANIS: Would it be possible, your
9 Honor, in the morning for the court reporter to
10 find it and have that read back?

11 THE COURT: No. If the jury wants to hear
12 it, I will have it read back to the jury, but you
13 please present the next question, Mr. Cranis.

14 BY MR. CRANIS:

15 Q Now, taking you back, Mr. Torrado, to the
16 coffee shop, and this is the coffee shop by the Motor
17 Vehicle Bureau in Miami?

18 A Yes, it is the coffee shop right near the
19 Motor Vehicle Bureau in the shopping center, adjacent to
20 it.

21 Q Now, Mr. Torrado, isn't it a fact that ac-
22 cording to your testimony that you did meet in the coffee
23 shop?

24 A No, no, we met outside and we walked to the
25 coffee shop.

MP/ffe
4am/2

1235

(The jury is in the jury box.)

THE COURT: Mr. Foreman, ladies and gentlemen of the jury. You found at your seats a form called Memorandum of Verdict. It contains a synopsis of the charge. It is my version of what the charge is. I will read the charge to you verbatim and that is what you will consider. You will have that before you to remind you what is charged in the indictment.

At this moment, the Memorandum isn't relevant to what I'm about to say except when we start the charge on the case of United States of America against Angel Castillon, Santiago Cabada, Carlos Hurtado, and Lucy Alvarez, I want the separate verdicts to remind you that each defendant is to be judged separately and the evidence measured against the charge is as to each defendant.

The best way to remember it is think of it as four separate trials and judge each defendant separately as if it were four separate trials.

We have reached the point the trial where it becomes my duty to instruct you on the law. I think a good starting point is to understand the role that everyone plays in a jury trial.

First, there are the lawyers. The lawyers on one side aren't always in agreement on every point in

2 1 the trial. You recognize that because each one
2 represents a client and their obligation is to the
3 client. Their obligation is not to anyone else's
4 client, just to their own client. It is a deep sense
5 of loyalty and obligation and you must understand it
6 that way. For these purposes, let's think of it as
7 the defendant and the Government.

8 The jury trial in this country is called an
9 adversary proceeding. In an adversary proceeding the
10 lawyers contest over issues, fact issues. The
11 Government produces evidence. And you saw the lawyers
12 cross-examine. The defendants lawyers cross-examined
13 and that is to develop the evidence in the case. The
14 theory being that when lawyers of comparable ability
15 contest over an issue we will get a proper development
16 of the evidence produced before the jury.

17 Then, it's for the jury to look at the evidence
18 and perform their job. But, you see the role of the
19 lawyer is that of a protagonist, somebody who has a
20 cause and believes in the cause and argues the cause.
21 They see it from one point of view. Obviously, just
22 as the defendant sees it from one point of view the
23 Government sees it from one point of view and the
24 Government is represented by a lawyer called the
25 United States Attorney just as the defendants are

11

3 1 represented by their own lawyers. But the Government's
2 lawyer gets no advantage because he happens to represent
3 the United States of America. The United States of
4 America has a certain obligation in this case and it
5 is treated like any other litigant coming before this
6 Court.

7 The difference between the position of the
8 lawyers and the Court and jury is that the Court and
9 jury as judges are objective and dispassionate. As
10 between the Court and the jury, the jury is the sole
11 judge of the facts.

12 (Continued on next page)
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You are expected to decide the facts of this case from the contested matters before you objectively as judges, free of all bias, prejudice, and sympathy, using your good common sense and experience in arriving at the facts.

There are many contested issues here. I have no business in your particular area, in a jury trial, and I have no opinion as to the guilt or innocence of any defendant here. And I recognize that this is solely left to you - the fact issues.

And just as I leave those matters solely to your good judgment, experience, analysis, so as jurors you must accept the law as I charge it because just as you are the sole judges of the facts I am the sole judge of the law.

All during the trial, I have made rulings as a matter of law and I attempted to apply it even handedly. I have no interest in this case one way or the other. My function here is only as an arm of the law. And so in giving my instructions I instruct you as I understand what the law is -- not only here but everywhere in the land. You must accept the law as I charge it because it is universal. At least, it is national.

When we talk about the law, particularly the

1
2 statutory law, that I will read to you, you may have
3 some private opinions as to what it should be. Whether
4 you like it or whether you think it is a good law, you
5 must set aside those personal views about the law and
6 accept the law as the Congress has enacted it and as I
7 interpret it. In applying the law as I charge it to
8 the facts, as you find them, you will arrive at a
9 verdict of guilty or not guilty as to each defendant
10 charged.

11 In my charge, I may use defendant or defendants,
12 or I may use the word accused. The charge applies to
13 all the defendants unless I single out a particular
14 defendant for a particular charge.

15 I will not review the evidence because the
16 lawyers have done that very competently. I may use
17 some of the testimony that was introduced into the
18 trial as an example of the principle of law and for no
19 other reason.

20 You've been told at the outset, you have been
21 told throughout the summations, and I repeat, the
22 defendant is presumed to be innocent. That is a time
23 honored presumption in Anglo-American law. It means
24 that you must conclude at the outset of the trial that
25 each defendant is innocent of the charge in this

Charge of the Court

indictment. That presumption remains with the defendant throughout the trial and throughout your deliberations and is only overcome if the Government proves the guilt of the defendant by proof beyond a reasonable doubt. So that the presumption of innocence alone is enough to acquit a defendant.

As one of the lawyers pointed out, your function is not really to determine whether the defendant committed the crime, but the precise duty of the jury is to find out, determine whether the Government sustained its burden of proving the guilt of the defendant by proof beyond a reasonable doubt.

You've heard the term Scotch verdict. In Scotland there are three verdicts: guilty, not guilty, and not proved. We don't have that here. Not guilty includes not proved. So that if the Government doesn't prove the guilt of the defendant by proof beyond a reasonable doubt, then you must find the defendant not guilty.

A reasonable doubt is a doubt which a reasonable person has after weighing all the evidence. It is a doubt based on reason and common sense. And the state of the record, which means the evidence in the case.

Reasonable doubt is not some vague, imaginative,

1
2 or imaginery or speculative doubt. A reasonable doubt
3 is the kind of doubt that would make a reasonable
4 person hesitate to ask in the most important of his or
5 her own affairs.

6 Proof beyond a reasonable doubt therefore is
7 proof of such a convincing character that you would be
8 willing to rely and act upon it unhesitatingly in the
9 most important of your own affairs.

10 The Government's burden is not to prove the
11 guilt of the defendant beyond all doubt, nor is the
12 Government's burden to prove that each and every bit of
13 evidence offered during the trial is true beyond a
14 reasonable doubt.

15 The Government's burden is heavy. It is to
16 prove every essential element of the crime charged
17 beyond a reasonable doubt.

18 I will instruct you later on what the essential
19 elements of this crime charged are.

20 A reasonable doubt may arise from the failure of
21 the Government to offer proof. You must remember that
22 the defendant need not offer any proof of innocence.
23 The defendant has the right to rely on the failure of
24 the Government to prove his or her guilt beyond a
25 reasonable doubt.

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Charge of the Court

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2 You don't measure the Government's burden by
3 the number of witnesses or the documents that are
4 introduced. It is the quality of the evidence, the
5 believability of the evidence.

6 What is evidence in the case? It is the
7 testimony of the witnesses regardless of who called
8 the witnesses. It is the exhibits that are marked in
9 evidence. It is the stipulation between attorneys
10 as to certain facts or a stipulation that certain
11 witnesses if called would testify in a certain manner,
12 and it is facts of which the Court takes judicial
13 notice.

14 In this case we have tapes of electronic
15 recordings and we have tapes of telephone conversations.
16 As you heard the lawyers argue the telephone
17 conversations were not transcribed and some eighteen
18 pages of the electronic recording, that is the Kel set
19 that Mrs. Torrado wore, has been transcribed.

20 Mrs. Harary testified in effect that if she
21 were to answer questions concerning what was on that
22 recording that she would testify similarly to the
23 transcription. But you need not accept that transcrip-
24 tion as beyond challenge because it is in effect the
25 testimony of Mrs. Harary. You will judge the

Charge of the Court

transcription of those tapes as you would the testimony of the witnesses.

I think it is important that you call your attention to those matters that are not in evidence that you may not consider. You may not consider as evidence statements made by counsel either in the openings or summations. They serve very useful functions but they are not evidence. The openings are designed to alert the jurors as to the testimony that is expected to come in during the trial so that you may more easily follow the testimony. The summations, on the other hand, are intended to call the jury's attention to the testimony or the evidence that the lawyers think are of significance, and offer to you theories and arguments of inculpability on behalf of the Government, which means arguments that the defendants are guilty, and exculpability on behalf of the defendants which means arguments that the Government has not proved its case. The important thing is those statements are not evidence.

I might say that we have a transcription of the evidence so that during your deliberations if you wish to hear any of the testimony or see any of the exhibits it will be available to you.

Charge of the Court

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2 Statements made by the Court are not evidence.
3 I am no different than any other participant in the
4 trial. I wasn't sworn or subjected to cross-examination.
5 If I made any statements don't consider them as
6 evidence. I might say, at this time, don't place any
7 special emphasis on questions that the Court asked.
8 During the trial, I thought there was an issue that
9 might have been a little fuzzy or I didn't quite
10 understand the answer, I asked the question only because
11 I thought if I were confused you might also be confused.
12 Of course it doesn't always turn out that way. It
13 wasn't to place any emphasis on any particular phase
14 of the case.

15 Evidence that is stricken from the record may
16 not be considered by you because it is not in the
17 record. Just as I direct the Court Reporter to
18 physically strike it from his notes, you are directed
19 to strike it from your mind and memory and certainly
20 from your consideration.

21 At times, I sustained objection to questions.
22 You may not speculate on what the answer might have
23 been had I permitted the witness to answer. You may
24 not consider it.

25 There were occasions when a lawyer asked a

1 question and in that question there was incorporated
2 a fact that had no basis whatever in the record. If
3 the witness answered no and rejected the suggestion
4 of the fact that was in the question you may not assume
5 there is evidence of the fact incorporated. In other
6 words, it's not in the record. The witness said no.
7 You may not consider it as evidence to the diametrically
8 opposed answer that the witness gave.
9

10 Evidence is the method by which a disputed fact
11 is proved or disproved. We have two general classifi-
12 cations, one is called direct evidence and the other
13 is called circumstantial evidence. Sometimes
14 circumstantial evidence is called indirect evidence.

15 Direct evidence is the testimony of witnesses
16 and what that witness saw and heard concerning that
17 particular fact that is in contest.

18 Circumstantial evidence on the other hand is a
19 method of proving or disproving a disputed fact by
20 drawing reasonable inferences based upon common sense
21 and experience from the facts that are established.

22 There is no mystery to the definition. It is
23 sometimes a little difficult to understand it in the
24 abstract so I will give an example. If you were
25 sitting here as a jury in a civil case and let's say

Charge of the Court

"A" was suing "B" for personal injuries, and say A was a woman so that I can recall the hypothetical facts or mold the hypothetical facts, let's assume that Mrs. A. claimed that Mr. B. negligently drove his automobile by passing a stop sign without stopping and striking her.

We will assume, for the purpose of this example, my courtroom deputy Mr. Adler and myself were standing on the corner where the stop sign was erected. We will say it is during the day and it was light and all the other circumstances that might be brought out in a trial. Let's assume he had his back to the roadway while I was looking directly at the roadway and the sign. If I were called to testify, I might say in answer to the lawyer's questions something like the following: I was standing on the corner with Mr. Adler at a particular time and place, the stop sign was directly in view. I saw Mr. B.'s car driven by someone who later was identified as Mr. B. coming down this roadway at 65 miles an hour and went right past the stop sign and struck A.

(Continued on next page)

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JB:ft

Charge

Well, that's direct evidence on that issue.

The issue is, did the defendant pass the stop sign without stopping.

Now Mr. Adler is called. He can't testify that he saw the motor vehicle pass the stop sign without stopping. But he can testify to certain circumstances from which the jury might draw an inference -- a reasonable inference that the motor vehicle passed the stop sign without stopping.

He might say, for example, "I was talking with the judge, and this 1977 white Cadillac came down the roadway about 65 miles an hour. I saw it come within my area of peripheral vision. I lost sight of it because I was talking to the judge for about 2 or 3 seconds, and about a hundred and fifty feet later, I turned to my left and I saw the motor vehicle proceeding at the same rate of speed and I saw it strike the plaintiff, Mrs A.

Now, there you have the circumstance from which the jury might draw the reasonable inference that the motor vehicle passed the stop sign without stopping, traveling at about 60 miles per hour, in two or three seconds traversed a hundred and fifty feet. So I think that the fair and reasonable infer-

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ence is that the motor vehicle did not stop at the stop sign and then proceed, but rather passed the stop sign without stopping.

So there you have the direct evidence on the issue. And the indirect evidence on the issue, the circumstantial evidence on the issue.

Now, it's important always to identify the issue that is contested and then determine whether there is direct evidence or whether from the circumstantial evidence you can draw a through and reasonable inference that proves the disputed fact.

The law does not hold that one type of evidence is of better quality than the other. The law requires that the government both on the circumstantial and the direct evidence prove the guilt of the defendant beyond a reasonable doubt.

Now, I have used the term "inference" and I have used the term "presumption." An inference is a conclusion which reason and common sense leads the jury to draw from facts which have been established by the evidence in the case. The jury may draw an inference. That's discretionary. But it's based on your good common sense and experience.

On the other hand, a presumption is a conclusion which the law requires the jury to make, and

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Charge

continues only so long as it is not overcome or outweighed by evidence in the case to the contrary. But unless and until the presumption is so outweighed, the jury is bound to find in accordance with the presumption. And the example of that, is the presumption of innocence.

You, the jurors, the sole judges of the credibility of the witnesses, which means the believability of their testimony and the weight their testimony deserves. Scrutinize the testimony given and the circumstances under which each witness testified and every matter in evidence which tends to show whether a witness is worthy of belief. Take into consideration the witnesses intelligence. Take into consideration the difficulty a witness had with the English language. Take into consideration the motive of the witness in testifying.

The state of mind of the witness. Why is a witness testifying? Is the witness testifying for some advantage to himself or herself? And when you determine motive, whether that is a motive for lying or telling the truth.

Take into consideration the demeanor and the manner of the witness while on the witness stand.

1 Did the witness answer the questions fully and directly,
2 or was the witness evasive? Did the witness try to
3 hide something?

4 Now, I instructed you during the trial that a
5 witness has certain limitations, particularly on cross-
6 examination where the witness is directed to answer
7 yes or no. And at times it's difficult to decide
8 whether it's yes or no. And so I gave the witness
9 the opportunity to say that he or she could not
10 answer the question yes or no. But in deciding
11 whether the witness was attempting to be evasive,
12 you take those limitations into consideration.

13 Take into consideration the witnesses own
14 ability to observe the matter which he or she is
15 called upon to testify. Take into consideration whether
16 the witness shall have impressed you as someone having
17 an accurate recollection of the events that transpired.
18 Take into consideration the relation that each witness
19 might bear to either side of the case. Take into
20 consideration the manner in which each witness might
21 be affected by the verdict, the events to which, if
22 at all, the witness is either supported or contradic-
23 ted by other evidence in the case.

24 If a witness is shown to have testified before
25 you to a material fact and testified falsely, if you

Charge

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2 find that the witness gave that testimony falsely and
3 it was done knowingly -- in other words, the witness
4 was aware that the testimony was false, that it was
5 to a material fact, you may disregard all that witness's
6 testimony on the theory that the witness is unworthy
7 of belief. ON the other hand, you may, if you wish
8 accept so much of that testimony as you find reliable.
9 And that principle underscores the wide discretion that
10 the jury has in assessing the credibility of witnesses.

11 A defendant who wishes to testify is competent
12 as a witness. You must judge his testimony in the same
13 manner as any other witness.

14 In this case, the defendant Hurtado testified.
15 And you judge his credibility the same as any other
16 witness and under the guidelines that I gave you, and,
17 of course, use your own common sense and experience.

18 On the other hand, the other three defendant s
19 decided not to take the stand. The law does not compel
20 a defendant in a criminal case to take the witness
21 stand and testify. No presumption of guilt may be
22 raised and no favorable inference of any kind may
23 be drawn in the failure of the defendant to testify.
24 A defendant, as previously charged, has the right
25 to rely on the failure of the Government to prove his

Charge

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2 or her guilt. It would be improper for you to even
3 discuss the failure of any defendant to take the
4 witness stand during your deliberations.

5 Jose Torrado said that he participated in
6 a crime involving conspiracy to deal in narcotics.
7 When a witness admits his participation in such a
8 crime, the witness is classified as an alleged
9 accomplice. An alleged accomplice is not incompetent
10 to testify because of his or her participation in
11 the crime charged.

12 On the contrary, the testimony of an alleged
13 accomplice alone, the testimony of Jose Torrado, I'll
14 rephrase that, Jose Torrado's testimony alone, if
15 believed by the jury to be true beyond a reasonable
16 doubt, may be of sufficient weight to sustain a ver-
17 dict of guilt even though not corroborated or support-
18 ed by other evidence in the case. However, the jury
19 should keep in mind that such testimony is to be
20 received with caution and weighed with care.

21 You should not convict a defendant upon the
22 unsupported testimony of an alleged accomplice unless
23 you believe such unsupported testimony to be true
24 beyond a reasonable doubt.

25 Jose Torrado was convicted of a number of crimes

Charge

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2 and he pleaded guilty. When he pleaded guilty, that's
3 a conviction. The testimony of a convicted felon --
4 and a felon means someone who is convicted of a crime
5 where the sentence is more than one year. -- The
6 testimony of a witness may be discredited or impeached
7 by showing the witness had been convicted of a felony.
8 A prior conviction does not render a witness incompetent
9 to testify, but it is merely a circumstance which you
10 may consider in determining the credibility of the
11 witness.

12 It is the province of the jury to determine
13 the weight to be given to any prior convictions as
14 impeaching testimony.

15 The law does not prohibit the use of informers.
16 Your personal disapproval of their use should not
17 enter in to your consideration of this case. But you
18 must consider the testimony of any informer who pro-
19 vided evidence against a defendant for pay, or for
20 immunity from punishment, or personal advantage, or
21 for vindication must be considered with care, weighed
22 with caution, and it must be examined more closely
23 than the testimony of an ordinary citizen.

24 Again, the jury is to determine the weight to
25 to be given to an informant's testimony.

Charge

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2 Evidence that a witness at a time prior to
3 taking the witness stand made statements inconsistent
4 with the testimony given at the trial is also impeaching
5 testimony. Take into consideration all the circumstances
6 and reasons for the witness giving the prior incon-
7 sistent statements.

8 As a matter of fact, the first question you
9 should decide is whether the prior statement is incon-
10 sistent and then take into consideration all of the
11 circumstances. Then you determine whether the incon-
12 sistent statement is as to a material or immaterial
13 matter. And judging all that, you decide the effect,
14 if any, a prior inconsistent statement has on the
15 credibility of the witness.

16 Now, you and I understand from long experience,
17 common sense -- and the experience could mean your
18 social relationship or business relationship -- that
19 even individuals who attempt to tell the truth and
20 the retelling in a number of times do not tell it
21 exactly in the same way that they told it on a previous
22 occasion. As a matter of fact, if someone told you
23 of some transaction, accident or event and described
24 it in exactly the same language, with exactly the same
25 gestures, exactly the same pauses, you'd probably

Charge

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2 suspect the veracity of the story. Because in our
3 human relations in our communications we do not do
4 it that way. There are some variations. But you as
5 experienced jurors understand when it's a variation
6 normal variation and when it's an inconsistent state-
7 ment. When you determine the effect it has on credi-
8 bility, you determine whether it was intentional or
9 whether it was just a mistake. And that would be
10 important in determining whether the inconsistent
11 statement should have an affect on the testimony
12 given before you and how great an affect.
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Charge of the Court

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THE COURT: (continuing) Agent Roque testified that he was requested by Agent Harris to interview the defendant Angel Castillon immediately after his arrest or sometime after his arrest on August 8th, 1975. It was offered by the Government as an admission.

Well, you determine whether it is or not. But before you determine that, you will have to determine whether the statement made by Angel Castillon, if you believe it was made, was made knowingly and voluntarily and intentionally. First determine whether the defendant Angel Castillon was given his Miranda rights.

And if you recall, briefly stated, told that he had a right to remain silent; that if he chose to say anything, whatever he said might be introduced in any court or proceeding; that he had a right to a lawyer. If he couldn't afford a lawyer, that the magistrate or the court would appoint one. And that if he chose to answer questions, at any time he could suspend the questioning and demand the presence of a lawyer. That he was aware of what his rights were.

Take into consideration all the facts and circumstances under which he was examined — his wait in the precinct for some 45 minutes, as I recall it, the number of agents around him, and then determine whether

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2 the Government proved beyond a reasonable doubt that
3 the statement was knowingly, voluntarily and intentionally
4 made.

5 If the Government hasn't proved that, then dis-
6 regard this statement allegedly made by Mr. Castillon.

7 I should turn to the indictment. And, of course,
8 the indictment is only a charge, and the defendants
9 have said, "Not guilty" to the indictment.

10 Charges as follows:

11 And, as I say, you have my version of what it says in
12 a short abstract. But what you should remember is
13 what I read to you.

14 "On or about and between the first day of April,
15 1975 and the 8th day of August 1975, both dates being
16 approximate and inclusive, within the Eastern District
17 of New York and elsewhere, the defendants Angel
18 Castillon, Santiago Cabada, Carlos Hurtado, Lucy
19 Alvarez, John Doe, also known as Jose Guzman, John
20 Doe also known as Conti, together with Jesu Alvarez,
21 Pedro Cruz, also known as Jesu Torrado, Petro Abilla,
22 and Rosa Rodriguez named herein as co-conspirators
23 but not as defendants did knowingly and intentionally
24 combine, conspire, confederate and agree to violate
25 Section 841(a)(1) of Title 21, United States Code.

Charge of the Court

"(1) It was a part of said conspiracy that the defendants would knowingly and intentionally possess with intent to distribute large quantities of cocaine, a Schedule II narcotic drug controlled substance.

"(2) It was further a part of said conspiracy that the defendants and others would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities."

In violation of Title 21, United States Code, Section 846.

Reference is made to a section or two sections of Title 21. Most of the Federal statute is codified. They are in books. And this Title 21 is called, Food and Drugs. And in 1970 the Congress passed the Drug Abuse and Control Act of 1970. Under it, the Congress declared that it was to the best interest, best public interest that the manufacture, importation, possession, distribution of narcotic drugs be closely supervised and controlled. And so in one of the sections, Section 812, it established schedules of both narcotic drugs and non-narcotic drugs.

Under Schedule II, it listed the following:

Briefly, cocoa leaves and any salt compound, derivative or preparation of cocoa leaves, and any

Charge of the Court

salt compound or derivative or preparation which is chemically equivalent or identical with any of these substances.

And I charge you that cocaine is a derivative of cocoa leaves and is a Schedule II narcotic drug.

That was a schedule listed by the Congress.

It also provided for a definition of the crime of possessing with the intent to distribute, and distributing cocaine in the following language. And I am just giving you the pertinent portions:

It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance.

These defendants are not charged with distributing or possessing with intent to distribute cocaine. They are charged with entering into a conspiracy to do that. In other words, to deal in cocaine. And they are charged with the conspiracy under Section 846.

It's very brief. And it says this:

Any person who conspires to commit any offense defined in this sub-chapter violates 846.

And the sub-chapter refers to 841(a)(1) that I discussed.

So it's the understanding, the agreement among

Charge of the Court

members of a conspiracy that this charge relates to.
And the Government, of course, charges that these four individuals were members of that conspiracy.

Now, what is a conspiracy? A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose.

The conspiracy has been called a partnership in criminal purposes in which each member becomes the agent of every other member for the purpose of conducting the partnership business.

I'm trying to think of the analogy to a lawful partnership so that you may clearly understand what the theory in law is of a criminal partnership or conspiracy.

There were three men -- and we will call them A, B, C -- in the clothing business, for example. Let's assume that one was the buyer, the other was the salesman, the other fellow dressed windows. Well, if A, the buyer, went out and purchased 100 suits of varying sizes and models and brought them in, that transaction would bind the partnership because it's during the partnership term of the partnership and/or partnership purposes. If the salesman sold the suits at -- well, let's say, at the wholesale price,

Charge of the Court

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2 the partners would be bound by that because it was
3 during the term of the partnership and for the partner-
4 ship purposes. And the same would go for the window
5 dresser, whether he dressed the windows poorly or well.
6 That's what we mean when we say each partner is bound
7 by the acts, declarations of the other partner made
8 during the course of the partnership, term of the
9 partnership and in order to promote the partnership
10 activities.

11 Now, let's assume in that illustration they
12 suddenly decided, instead of running a legitimate
13 business, they'd run an illegitimate business. They
14 hijacked a truck carrying clothing and they sell it
15 in the store. Now, instead of calling them partners,
16 they are called conspirators or members of the co--
17 spiracy. But the agency and the binding power of one
18 partner binding the other for partnership purposes
19 during the term of the partnership remains.

20 In order to establish a criminal conspiracy,
21 the Government must do more than show that the people
22 associated with each other or that they discussed
23 common aims and interests. The mere presence of a
24 defendant at the place and at a time that conspiratorial
25 activities were being carried on does not prove member-

Charge of the Court

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2 ship in a conspiracy. Even knowledge that conspiratorial
3 activities were going on does not prove membership in
4 a conspiracy.

5 For example, if a customer came into the store,
6 in that clothing outfit that I was telling you about,
7 and he heard them talking about stolen merchandise and
8 he did nothing more than listen, he couldn't be con-
9 sidered a member of the partnership. He couldn't be
10 considered a member of the conspiracy.

11 If he did something affirmatively, being aware
12 of the nature and the extent of the conspiracy, and
13 maybe bought 10 suits from them and knowing it was
14 stolen, then went out and he sold them to friends of
15 his, that would be participation, knowing participation,
16 intentionally participation in the partnership.

17 It isn't necessary for the Government to prove
18 that any formal agreement existed, nor that the partners
19 understood all of the ramifications of the conspiracy,
20 nor that the partners knew one another. I think one
21 lawyer pointed out that there was no showing in the
22 evidence that his client even knew any of the other
23 people or defendants that were here, or for that
24 matter knew of them.

25 It isn't necessary for the Government to prove

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Charge of the Court

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that they knew each other. What the evidence in the case must show beyond a reasonable doubt is that the defendants in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding as to the purposes of their getting together, and their understanding that it was to engage in the cocaine business.

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The evidence in the case must show beyond a reasonable doubt that the conspiracy charged in the indictment was knowingly formed. In other words, that the parties were aware that they were dealing in cocaine and that one or more of the methods described in the indictment were agreed upon and were used in an effort to accomplish some object or purpose of the conspiracy.

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Now, that's one element of the crime, establishment of the conspiracy. And the Government must prove that beyond a reasonable doubt.

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Next, proof that the accused or the defendant entered the conspiracy with full knowledge of the purposes of the conspiracy.

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A defendant or an accused who has no knowledge of the conspiracy, but happens to act in a way which furthers the objects or purposes of the conspiracy,

Charge of the Court

doesn't become a member of the conspiracy.

For example, someone stops a car and waves it over, and says, "Do you mind taking me 2 miles to the railroad?"

You say, "Come on, hop in."

It turns out that he's carrying stolen securities. No knowledge that it was for the purpose that he was carrying stolen securities. On the other hand, it furthers the purpose of that crime.

On the other hand, if someone stops you when you happen to know him, and he says, "Look, I have to make a quick getaway. I've got stolen securities. Will you drive me to the railroad?"

Now, it's done with knowledge.

So there is a difference between acts done with knowledge and acts done without knowledge.

Before the jury may find a defendant or any other person has become a member of the conspiracy, the evidence indicates and must show beyond a reasonable doubt that that defendant knowingly and willfully participated in the unlawful plan with the intent to advance the purpose of the conspiracy, to wit, to deal in cocaine.

(continued next page)

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2 In other words, the Governmnet must prove beyond
3 a reasonable doubt that the accused was aware in what-
4 ever dealings he had, if you find he was dealing, was
5 aware that it was a conspiracy dealing in cocaine. And
6 that he or she deliberately and intentionally, knowing
7 it was unlawful to deal in cocaine, nevertheless per-
8 formed the acts that advanced the purpose of the
9 cocaine business -- that was the business of this
10 conspiracy.

11 The Government must show the dealing was not
12 inadvertent -- in other words, just something that
13 was negligent or careless or done through some
14 mistake, but rather deliberate with full knowledge.

15 And the third element that the Government must
16 prove is that one of the members of the conspiracy per-
17 formed an overt act knowingly in furtherance of the
18 conspiracy. In other words, that one of the members --
19 it need not be the particular memeber charged -- but one
20 member, once you find he is a member of the conspiracy,
21 the Government doesn't have to prove the particular
22 individual performed the overt act but that the overt
23 act was knowingly done in furtherance of the conspi-
24 racy.

25 An overt act is any act that is significant

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step in furthering the purposes of the conspiracy. It could be as innocent looking as going to a telephone and calling up a supplier or a purchaser and making a date with a supplier or purchaser to either arrange the purchase or the sale of cocaine. It must be done with knowledge that that is the purpose.

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In order to bring any accused into a conspiracy, it must be based on evidence of what that individual said or did. Now, set aside for a moment the charge that I gave you on acts or declarations of one member of the conspiracy that binds another. That is a question on how to deal with the evidence. Now we are talking about criminal liability. How do you decide a man is guilty? That must be done on what he says or does. So that when, for example, Mr. Castillon is talking with Mrs. Torrado, the name Santiago Cabada, or whatever name was mentioned, comes up, you can't take that as evidence in determining whether he became a member of a conspiracy. It wasn't his act or declaration.

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If you believe the testimony of Jesus Torrado that when he met Mr. Cabada they talked about cocaine, you may take that into consideration, if it is credible, to determine whether Mr. Cabada was in the conspiracy.

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2 That is the example I can think of and the
3 only one I can think of at the moment. I only remem-
4 bered it because Mr. Sonnett referred to it in his
5 summation.

6 The point is, in order to determine whether the
7 Government proved that the defendant knowingly and
8 intentionally and wilfully entered into the conspiracy
9 it must be that testimony that describes what the par-
10 ticular defendant said or did, not what somebody else
11 mentioning the defendant's name said the defendant said
12 or did.

13 It's only fair because in our system of justice
14 a man is judged only by what he says or does and not
15 what somebody else says about him. That should not
16 be confused with the charge that I gave you about
17 dealing with the evidence.

18 You see, once somebody is found to be a member
19 of the conspiracy, after that finding, that one member
20 of the conspiracy says during the course of the conspi-
21 racy and in order to promote the cocaine business
22 charged in this conspiracy is binding on any of the
23 accused that you find has knowingly entered the conspi-
24 racy. I hope you have those two principles separate
25 and distinct.

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2 Now, Mr. Hurtado took the witness stand and
3 admitted that approximately two ounces of cocaine that
4 was seized in his home belonged to him. He testified
5 that he had the cocaine for his own use and not for
6 sale. It is the Government that must prove that this
7 cocaine was for sale. The conspiracy charged is a
8 conspiracy to distribute and possess with intention to
9 distribute. That means selling it, or if you possess
10 it, it is with intention of selling it because you are
11 in the business. If the Government has failed to
12 show that -- and you take all these circumstances into
13 consideration -- the Government has failed to show
14 that this cocaine was for sale, then you must eliminate
15 that evidence from your consideration. I don't say
16 there isn't any other evidence in the case but you judge
17 each defendant on all the evidence applicable to the
18 defendant.

19 In determining the guilt or innocence of any
20 defendant, you don't determine the degree of guilt.
21 You don't say well, this defendant is less guilty and
22 that one was more guilty. You determine whether -- if
23 the conspiracy is established -- whether he or she
24 became a part of it. The degree of guilt has nothing
25 to do with it. The Government either proves^d that the

defendant was a member or failed to do it.

So, in evaluating, in weighing the evidence, against the essential elements of the crime, I charge you that the Government must prove beyond a reasonable doubt the following three elements:

One, the conspiracy described in the indictment was knowingly and wilfully formed at or about the time alleged. That means that the conspiracy to deal in cocaine is shown to you to have existed by proof beyond a reasonable doubt.

Two, that the accused knowingly and wilfully became a member of the conspiracy; and three that one of the conspirators thereafter knowingly committed at least one overt act in furtherance of the objective of the conspiracy which was to deal in cocaine.

Don't consider questions of punishment. You've heard a lot of numbers around here and possible maximum sentences and so forth. That is a matter for the Court. The Court will consider that only if you find a defendant guilty. Your duty is to determine whether the Government proved the defendants' guilt.

Your verdict must be unanimous. Each juror must decide the case for himself or herself based on the evidence. It would be improper for any juror to enter

1 the jury room with any particular view as to the guilt
2 or innocence of any defendant and refuse to discuss the
3 evidence with the other jurors. It would be just as
4 improper for any juror to abandon his obligation or
5 her obligation and say, in effect, well, I will go
6 along with whatever the majority says. It is
7 not majority vote, it is unanimous vote.
8

9 You must keep in mind, you must discuss the
10 evidence and exchange views. If you've decided one
11 particular way, on any particular defendant, and during
12 the discussions you are convinced that you were wrong
13 in the first place, then of course the answer is that
14 you should give up the determination that you first
15 made and accept the view based on the evidence that
16 you come to. So it is a continuous discussion and
17 exchange of views that makes for fairness in the ver-
18 dict.

19 If you wish to communicate with the Court, you
20 will do it through your Foreman. If you wish to hear
21 any of the testimony read back to you I will read it
22 back to you. Try to identify the witness and the
23 subject matter if you can. It will take a little time
24 finding it but as soon as I find it I will call you
25 back into the courtroom and I will read it to you.

45

1
2 If you want any of the exhibits they will be
3 sent in to you. I won't send them in unless you
4 request them.

5 I ask you not to ask me to tell you what such
6 and such witness said because that would be preempting
7 your authority to decide the facts. That would be
8 giving you my version of the testimony. I won't do
9 that. That is improper for me to do. I will
10 do nothing more than read what the witness said before
11 you during the trial.

12 At this point, I would ask you to take leave of
13 the Court. Don't start your deliberations yet, I want
14 to talk to the lawyers.

15 The jury is excused.

16 (The jury left the courtroom.)

17 (Continued next page.)
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(The following took place outside of the presence of the jury.)

THE COURT: Mr. Clayman, do you have any exception or objection to the charge?

MR. CLAYMAN: No sir.

THE COURT: Mr. Kranis?

MR. KRANIS: No sir.

THE COURT: Mr. Sonnett?

MR. SONNETT: Yes. The Court in giving its jury charge I believe neglected in that portion dealing with the admission made by Castillon to say that the admission is evidence against Castillon and not against the other defendants

THE COURT: Oh yes.

MR. SONNETT: Other than that, I have no exceptions.

MR. MATTARAZZO: I have no exceptions.

MR. BLOCK: If your Honor please, the Court indicated that you would give in your own language request to charge of the defendant Hurtado 10, 11, 12, 13, 14, and 15, dealing with the conspiracy.

I respectfully submit, although it is frankly difficult to follow as I jump from one to the other, that the Court has failed to give the essence of those

1
2 requests to charge.

3 THE COURT: Let's go over them. I said that
4 a reasonable doubt is not a doubt based on surmise,
5 suspicion or something like that, speculation. That
6 is 11.

7 MR. BLOCK: I don't believe that your Honor, as
8 to number 11 --

9 THE COURT: I'm coming to the second paragraph.

10 MR. BLOCK: I'm sorry.

11 THE COURT: I told them in the essential elements
12 they would have to prove beyond a reasonable doubt that
13 he knowingly and wilfully joined the conspiracy and
14 was aware of it. That covers it.

15 MR. BLOCK: The first paragraph in number 11,
16 I don't recall the Court saying the Government must
17 meet th burden by offering substantial evidence which
18 is worthy of belief --

19 THE COURT: I think it's unfair to the other
20 defendants. I think it is reversible in this Circuit
21 -- substantial evidence.

22 Substantial evidence may not reach the level
23 of preponderance. When we review Social Security mat-
24 ters it merely requires substantial evidence. Frankly,
25 all the terms are terms that the jury understands. They

1
2 know it is a lot of proof. It is a heavy burden, and
3 I used heavy burden. You might think that substantial
4 evidence is greater than reasonable doubt, proof beyond
5 a reasonable doubt.

6 MR. BLOCK: I would be satisfied with the term
7 heavy burden. However, it's difficult to follow through
8 all the different instructions while your Honor was
9 presenting it. It makes it difficult --

10 THE COURT: Where else did I fail to cover it?
11 I didn't use your language. I didn't use my own lan-
12 guage at times.

13 MR. BLOCK: It made it difficult for me to
14 follow.

15 THE COURT: Maybe I will read a charge, I think
16 it is a safe way of doing it.

17 14 I gave. I gave it almost in that language.

18 15 I gave.

19 16 I certainly gave.

20 MR. BLOCK: With reference to 16, again I res-
21 pectfully make this comment, when your Honor finished
22 giving 15, your Honor added: "I don't say that there
23 isn't any other evidence," and failed to add: I also
24 don't say that there is any other evidence.

25 THE COURT: I will say it. I was going to say

1
2 that you must find them not guilty and then I realized
3 that that isn't true. That is the trouble with charg-
4 ing extemporaneously. There is evidence. So I wanted
5 to make sure they understood it didn't require an
6 acquittal. But I will say, I don't say there is evi-
7 dence or isn't evidence.

8 MR. BLOCK: I submit that that error is of such
9 a nature that it cannot be cured and we'll merely magni-
10 fy the error at this point.

11 THE COURT: You don't want a charge, I won't
12 give it and you have your exception.

13 MR. BLOCK: I will accept the Court's offer but
14 I still reserve any objection. I feel the Court is
15 trying to cure it but it is of such magnitude it is
16 merely going to magnify it by repeating what the Court
17 has already said and give it undue emphasis.

18 THE COURT: I will try to ameliorate the preju-
19 dice that you think occurred because of that. I don't
20 believe it but if you believe it I respect your judg-
21 ment.

22 MR. BLOCK: I don't recall your Honor giving
23 the charge as we discussed on specific intent and
24 knowingly --

25 THE COURT: As a matter of fact, at the very

1
2 end, I don't know whether I should avoid saying knowing
3 that it is a violation of law because as I say the
4 Drug Act doesn't use wilfully anymore which was part
5 of the definition, it rather uses knowingly and inten-
6 tionally. I think the use of that term would be
7 enough. For your benefit I threw in knowing that it
8 was a violation of law.

9 MR. BLOCK: It's difficult to follow.

10 THE COURT: That is one of the reasons I do it
11 that way.

12 Bring in the jury.

13 (The jury is in the jurybox.)

14 THE COURT: In charging you on admissions
15 allegedly by Mr. Castillon, I told you if you find
16 the Government didn't prove beyond a reasonable doubt
17 they were knowingly, voluntarily and intentionally made,
18 you may not consider them against Mr. Castillon. If
19 you find that they were knowingly, voluntarily and
20 intentionally made, then they are chargeable only against
21 Mr. Castillon. Don't charge his admissions against
22 any other defendant. Do you understand that?

23 One more thing, when I was talking about
24 Mr. Hurtado's testimony about the seizure of two
25 ounces of cocaine, I said that if the Government failed

1
2 to prove that this cocaine was to be used for resale
3 in part of the conspiracy, then you may not charge
4 that against him. Because the conspiracy charged here
5 is conspiracy to deal in cocaine, the charge is not
6 conspiracy to use it for oneself.

7 As I say, there may be other testimony in the
8 case against Mr. Hurtado and may be there is no other
9 testimony against Mr. Hurtado. But you decide this
10 and you have a look at it.

11 Is there any need not to excuse the jury on the
12 supplemental charge?

13 MR. SONNETT: No.

14 THE COURT: I will excuse alternate number two.
15 I understand your lunch has arrived. I would appreciate
16 your taking your lunch and having it elsewhere if you
17 don't mind. You can go into my office and the girls
18 will give it to you. But you can't have it with the
19 other jurors. If you have any personal effects take
20 them out.

21 Will the Clerk please swear in the Marshals.

22 (Alternate Juror Number Two excused.)

23 (Marshals sworn by the Clerk of the Court at
24 this time.)

25 THE COURT: I expect the jurors will decide this

1
2 case on the evidence and in accordance with the law
3 as the Court charged it and free from all bias, pred-
4 judice and sympathy. That is the oath you took in
5 effect when you took your oath as jurors.

6 Now, I am going to excuse the jury so they
7 can have their lunch. If you give me a note, I can't
8 take it up with you until I have taken it up with the
9 lawyers. If you have any questions, send it in. If
10 you want the testimony read, send the note in. At
11 about a quarter of two or two o'clock, the lawyers
12 will come back from lunch and I will take it up with
13 you.

14 The jury is excused for deliberation on the
15 matter before them.

16 (The jury left the courtroom.)

17 THE COURT: We will suspend for lunch and if
18 you can get back before two it might be a good idea
19 because I imagine something will be coming from the
20 jury by then. Suppose we make it five minutes to to
21 give you an hour and ten minutes today.

22 MR. SONNETT: Until reporting back?

23 THE COURT: Yes, five minutes until.

24 MR. KRANIS: The exhibits, should I leave them
25 here?

1
2 THE COURT: I think you ought to take the ex-
3 hibits with you. The exhibits are returned to the
4 file from the lawyer from which they came regardless
5 of who had them marked. That might be what you are
6 required to do when you come back. Go over the exhibits
7 and put them on the Clerk's bench so that there is
8 no question that the exhibits are here and may be given
9 to the jury if requested. Sometimes these labels might
10 be prejudicial. I don't know, you make that decision.

11 MR. MATTARAZZO: There is a request by the
12 Marshal to have my client go downstairs for prints.

13 THE COURT: If we have no record of it, I want
14 her printed.

15 MR. MATTARAZZO: All right. Where do you want
16 her to go?

17 THE MARSHAL: Room 172.

18 (A recess was taken at this time until 1:55 P.M.)
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FILED

M' FILMED

United States District Court for

EASTERN DISTRICT OF NEW YORK

United States of America vs.

DEFENDANT

ANGEL CASTILLON

DOCKET NO.

75 CR 698

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
December 17, 1976

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

RICHARD KRANIS, ESQ.
(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

FINDING &
JUDGMENT

Defendant has been convicted as charged of the offense(s) of violating T-21, U.S.C., Sections 841(a)(1) and 846 in that on or about and between the 1st day of April 1975 and the 8th day of August 1975, both dates being approximate and inclusive, the defendant with others did knowingly and intentionally combine, conspire, confederate and agree to possess with intent to distribute large quantities of cocaine and conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and a special parole term of five (5) years.

SENTENCE
OR
PROBATION
ORDER

SPECIAL
CONDITIONS
OF
PROBATION

ADDITIONAL
CONDITIONS
OF
PROBATION

COMMITMENT
RECOMMEN-
DATION

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ DEC 17 1976 ★

TIME A.M. _____
P.M. _____

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge

☐ U.S. Magistrate

David M. Miller

Date

12/17/76

55

RECEIVED
U.S. ATTORNEY

MAR 14 10 14 AM '77

EAST. DIST. N. Y.

*Paula
Gammone*